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No. 04-598

Supreme Court, U.S.
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In The
Supreme Court of the United States

FRANK P. FOGERTY AND NATHAN CROW,

Petitioners,

v.

MGM GROUP HOLDINGS CORP., INC., UNIVERSAL MUSIC GROUP, INC., UNIVERSAL STUDIOS, INC., EON PRODUCTIONS, LTD., UNITED ARTISTS CORP., DANJAQ, LLC, METRO-GOLDWYN-MAYER STUDIOS INC., AND METRO-GOLDWIN-MAYER MUSIC INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit was correct in affirming the District Court's decision granting Respondents' motion for summary judgment on the basis that no genuine issue of material fact existed regarding the independent creation of the allegedly infringing musical composition prior to the earliest date when access by Defendants is alleged to have occurred.[1]

[1] The Petitioners' "Questions Presented" incorrectly states that the Sixth Circuit made new copyright law by impermissibly shifting to plaintiff the defendant's burden of proving the affirmative defense of prior independent creation. (Petition at i). In fact, the Sixth Circuit expressly based its decision on the "undisputed evidence" presented by defendants establishing the prior independent creation of the musical composition at issue. App. 9a ("App." refers to the Appendix attached to the Petition for Writ of Certiorari).

PARTIES TO THE PROCEEDING

Frank P. Fogerty and Nathan Crow, *Petitioners*.

MGM Group Holdings Corp., Inc., Universal Music Group, Inc., Universal Studios, Inc., EON Productions, Ltd., United Artists Corp., Danjaq, LLC, Metro-Goldwyn-Mayer Studios Inc., and Metro-Goldwyn-Mayer Music Inc., *Respondents*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents MGM Group Holdings Corp., Inc., Universal Music Group, Inc., Universal Studios, Inc., EON Productions, Ltd., United Artists Corp., Danjaq, LLC, Metro-Goldwyn-Mayer Studios Inc., and Metro-Goldwyn-Mayer Music Inc., make the following disclosure:

1. MGM Group Holdings Corp., Inc.'s assets are owned by Metro-Goldwyn-Mayer Studios Inc. which is a wholly-owned subsidiary of Metro-Goldwyn-Mayer Inc.

2. Universal Music Group, Inc. is a wholly-owned subsidiary of Vivendi Universal S.A.

3. Universal Studios, Inc. is a division of NBC Universal, Inc. which is a wholly-owned subsidiary of General Electric Corp. and Vivendi Universal S.A.

4. United Artists Corp. is a wholly-owned subsidiary of Metro-Goldwyn-Mayer Studios Inc. which is a wholly-owned subsidiary of Metro-Goldwyn-Mayer Inc.

5. Metro-Goldwyn-Mayer Studios Inc. is a wholly-owned subsidiary of Metro-Goldwyn-Mayer Inc.

6. Metro-Goldwyn-Mayer Music Inc. is a wholly-owned subsidiary of Metro-Goldwyn-Mayer Studios Inc. which is a wholly-owned subsidiary of Metro-Goldwyn-Mayer Inc.

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STATEMENT OF THE CASE

Respondents respectfully urge the Court to deny Petitioners' Petition for Writ of Certiorari to review the decision entered in this case by the United States Court of Appeals for the Sixth Circuit. The opinion does not create new copyright law, is fully consistent with decisions of this Court and other circuits and does not raise important constitutional or federal questions warranting this Court's review.

Summary judgment was properly granted in this case by the United States District Court for the Middle District of Tennessee. In support of their motion, Respondents presented the District Court with numerous declarations and abundant documentary evidence proving the independent creation of the musical composition "The World Is Not Enough" ("TWINE") prior to the first date when Petitioners claim to have delivered a copy of their song, "This Game We Play" ("GAME"), to Respondents. Petitioners failed to present any affirmative evidence contradicting Respondents' proof or otherwise creating an issue of material fact regarding the date of the prior independent creation of TWINE.

The District Court's decision was correctly affirmed on appeal. The Sixth Circuit correctly framed the issue on appeal as "whether David Arnold independently created [TWINE] before February 4, 1999, and whether the undisputed evidence establishes that fact." (App. 9a). The Sixth Circuit concluded that the undisputed evidence did establish that David Arnold independently created TWINE before February 4, 1999. (*Id.*)

The Sixth Circuit noted that Petitioners conceded that Arnold did not have access to GAME prior to February 4,

1999. (*Id.*) The Sixth Circuit reviewed the unrefuted evidence in the record presented by Respondents regarding the creation of TWINE prior to February 4, 1999, and specifically noted that a copy of the demonstration recording of TWINE was delivered to a hotel in London on January 20, 1999. (*Id.* at 9a-10a). The Sixth Circuit further noted that no evidence was presented by Petitioners to contradict that TWINE was created prior to February 4, 1999. The Sixth Circuit then addressed specifically each of Petitioners' arguments "designed to show that [Petitioners] nonetheless should be able to present their claim to a jury" (App. 11a), and the court found that "[e]ach [of Petitioners' arguments] is unconvincing." (*Id.*)

STATEMENT OF THE FACTS

Petitioners Frank Fogerty and Nathan Crow alleged that the theme song "The World Is Not Enough" from the James Bond film of the same name infringed their copyright in the composition "This Game We Play." The parties agree that Respondents did not have access to GAME until, at the very earliest, February 4, 1999. (App. 9a). The question before the District Court and Sixth Circuit, therefore, was whether the undisputed evidence established that David Arnold independently composed TWINE and provided it to Respondents prior to February 4, 1999. To prove prior independent creation, Respondents presented to the District Court affidavits, deposition testimony and documentary evidence establishing the following facts:

In 1998, Michael Wilson and Barbara Broccoli, the producers of James Bond films, contacted the accomplished

songwriter David Arnold[2] about the possibility of his composing the theme song for the James Bond film "The World Is Not Enough" (the "Film"). (Declaration of David Arnold ("Arnold Decl.") at ¶ 3, JA 064; Declaration of Michael Wilson ("Wilson Decl.") at ¶ 4, JA 104; Declaration of Barbara Broccoli ("Broccoli Decl.") at ¶ 4, JA 097).

In November and December 1998, Arnold collaborated with Don Black ("Black"), an accomplished lyricist[3], in composing TWINE. (Black Depo. at 12-15, JA 256-57; Arnold Decl. at ¶ 4, JA 065; Declaration of Don Black ("Black Decl.") at ¶ 3, JA 068). Black completed the lyrics, and Arnold then completed the composition of TWINE. (Arnold Decl. at ¶ 4, JA 065; Black Decl. at ¶ 6, JA 069).

In December 1998, Arnold played the main melodic theme of TWINE on a grand piano in the entrance hallway of Air Studios in London, England, for Isabel Griffith and Jeff Foster, employees of Air Studios. (Arnold Decl. at ¶ 5, JA 065).

On January 6, 1999, Arnold completed an initial demonstration recording of TWINE (the "Demo"). (Arnold Decl. at ¶ 6, JA 065), and on January 7, 1999, Broccoli and Wilson listened to the Demo. (Arnold Decl. at ¶ 7, JA 065; Broccoli Decl. at ¶ 6, JA. 098; Wilson Decl. at ¶ 6, JA 105).

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[2] Arnold composed the end-title theme for a previous James Bond film, "Tomorrow Never Dies." (Broccoli Decl. at ¶ 3, Joint Appendix in the Court of Appeals. ("JA") 097). Arnold received a Grammy award for best score for the film "Independence Day." (Arnold Depo. at 6, JA 223).

[3] Black wrote the lyrics to four James Bond theme songs in addition to TWINE. Black has been nominated for five Academy awards and numerous Grammy awards, and he has won one Academy award, two Tony awards, five Ivor Novello awards and a Golden Globe award. (Black Depo. at 5-6, JA 255).

As the Sixth Circuit specifically noted, MGM "produce[d] an original copy of the Demo from Don Black [and] Plaintiffs do not refute the authenticity of Black's copy of the song." (App. 17a).

After listening to the Demo, Broccoli and Wilson suggested that Arnold arrange for Michael Apted ("Apted"), the director of the Film, to listen to the Demo. (Arnold Decl. at ¶ 7, JA 065; Wilson Decl. at ¶ 6, JA 088; Broccoli Decl. at ¶ 6, JA 098). On January 8, 1999, Arnold met with Apted at Pinewood Studios in London, England, and played the Demo for him. (Arnold Decl. at ¶ 8, Exh. A, JA 065).

Contemplating that the musical group Garbage, and/or its lead singer, Shirley Manson ("Manson"), would perform TWINE for the Film's soundtrack (Arnold Decl. at ¶ 9, JA 065), Arnold had his personal assistant, Trish Hillis ("Hillis"), arrange for Manson to hear the Demo. (Arnold Decl. at ¶ 9, JA 065; Declaration of Trish Hillis ("Hillis Decl.") at ¶ 7, Exh. C, JA 072). On January 20, 1999, Hillis took the Demo to the Royal Garden Hotel in London, where Manson was staying,[4] and left it at the front desk as instructed by Manson's tour manager, Harald Kohl. (Hillis Decl. at 11, Exh. B, C, JA 073). Manson subsequently listened to the Demo. (Manson Depo. at 27, JA 213).

In late January 1999, while discussing potential theme songs for the Film, Broccoli told Michael Sandoval

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[4] A bill from the Royal Garden Hotel and Garbage's promotional schedule each indicate that Manson stayed there on January 20, 1999. (Declaration of India England at ¶ 4, Exh. A, JA 090; Declaration of Mary Ann McCready at ¶ 4, Exh. A, JA 100).

of MGM Studios ("Sandoval") that she had heard TWINE and that she wanted to use the song for the Film. As a result, Sandoval asked Arnold to provide him with a copy of the Demo. (Declaration of Michael Sandoval at ¶ 3, JA 078). On February 2, 1999, Arnold sent the Demo via express mail to Vas Vangelos, his agent in the United States. (Arnold Decl. at ¶ 12, JA 066). Vangelos then delivered the Demo to MGM Studios on February 3, 1999. (Arnold Decl. at ¶ 12, JA 066).

Garbage recorded the commercially-released version of TWINE in June and August 1999. But for unrelated changes in the arrangement and lyrics, the commercial recording is melodically identical to the Demo (Arnold Decl. at ¶ 14, JA 066; Black Decl. at ¶ 7, JA 069; Broccoli Decl. at ¶ 7, JA 098; Wilson Decl. at ¶ 7, JA 088), an original copy of which was provided to the District Court. (Declaration of Susan Shurman at ¶ 3, Exh. A, JA 095; Black Decl. at ¶ 8, JA 069).

Petitioners presented no direct evidence whatsoever to the District Court to rebut the evidence submitted by Respondents. Instead, Petitioners' only response to the abundant evidence proving prior independent creation was, in effect, an allegation of wholesale, coordinated perjury by the various witnesses. After the District Court granted Respondents summary judgment, Petitioners appealed. Pointing to immaterial inconsistencies in the testimony of the witnesses and the failure of Arnold (but not Black) to produce an original copy of the Demo, Petitioners asserted that genuine issues of material fact exist as to when TWINE was created and asked the Sixth Circuit to reverse the order of the District Court granting summary judgment in favor of the Respondents. The Sixth Circuit refused for the reasons set forth in its opinion, and

Petitioners subsequently filed this Petition for Writ of Certiorari on the same grounds.

REASONS WHY PETITION SHOULD BE DENIED

None of the criteria set forth in Supreme Court Rule 10 that could establish a "compelling reason" to grant the petition is present here. Petitioners have failed to identify any way in which the Sixth Circuit's decision:

(1) conflicts with the decision of another United States Court of Appeals,

(2) decides an important federal question in a way that conflicts with the decision by a state court of last resort,

(3) so far departs from the accepted and usual course of judicial proceedings to justify an exercise of this Court's supervisory power,

(4) decides an important question of federal law previously undecided by the Court or,

(5) conflicts with relevant decisions of this Court.

Supreme Court Rule 10 specifically provides that a petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit submitted by Petitioners in this case is nothing more than a claim by Petitioners that the Sixth Circuit has misapplied properly stated rules of law. This case is not suitable for Supreme Court review

for this reason alone. Nevertheless, the case is also not suitable for review because the Sixth Circuit did **not** misapply any rule of law or render a decision which is otherwise appropriate for review based on Supreme Court Rule 10.

I. THE SIXTH CIRCUIT DID NOT MISSTATE ANY RULE OF LAW

As set forth in the Sixth Circuit's opinion, that court correctly stated and supported with appropriate citation the following twelve principles governing summary judgment and copyright law:

1. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). (App.7a);

2. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, the Supreme Court has held, "there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotation omitted). (App. 7a-8a);

3. A district court's summary-judgment decision receives de novo review. *See Farhat v. Jopke*, 370 F.3d 580, 587 (6th Cir. 2004). (App. 8a);

4. The Copyright Act gives copyright owners exclusive rights to reproduce, prepare derivative

works from, distribute, and publicly perform or display a copyrighted work. *See* 17 U.S.C. § 106. (App. 8a);

5. To the ends of protecting these rights, the Act allows "[t]he legal or beneficial owner of an exclusive right under a copyright . . . to institute an action for any infringement of that particular right. 17 U.S.C. § 501(b). (App. 8a);

6. A claim of copyright infringement requires proof of "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, (1991); *see also Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999). (App. 8a);

7. Because claimants rarely have direct evidence of copying, they typically try to establish an inference of copying by showing "(1) access to the allegedly-infringed work by the defendant(s) and (2) a substantial similarity between the two works at issue." *Ellis*, 177 F.3d at 506. (App. 8a);

8. "Access," we have held, "is essentially hearing or having a reasonable opportunity to hear the plaintiff[s'] work and thus having the opportunity to copy" and "may not be inferred through mere speculation or conjecture." *Id.* (quotations omitted). (App. 8a);

9. The "substantial similarity" analysis first requires a filtering of the unprotectable aspects of the protected work, then asks whether an "ordinary observer" would perceive the original and the alleged copy as substantially similar. *See Kohus v. Mariol*,

328 F.3d 848, 855-57 (6th Cir. 2003). (App. 8a-9a);

10. Once a plaintiff establishes access and substantial similarity, the defendant may rebut the presumption of copying by showing independent creation of the allegedly infringing work. *Ellis*, 177 F.3d at 507; *see also Susan Wakeen Doll Co. v. Ashton Drake Galleries*, 272 F.3d 441, 450 (7th Cir. 2001). (App. 9a);

11. Lastly, even without proof of access, a plaintiff still may prevail by showing a "striking similarity [between the works], precluding all possible conclusion but that the work was copied." *Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 325 (6th Cir. 2004). (App. 9a); and

12. *See Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995) ("[A] nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations. . . . [I]nstead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment."); *Curl v. Int'l Bus. Machs. Corp.*, 517 F.2d 212, 214 (5th Cir. 1975) ("[T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and . . . the opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof.") (quotation omitted); *Eaton v.*

> *Nat'l Broad. Co.*, 972 F. Supp. 1019, 1024 (E.D. Va. 1997) ("[A] copyright plaintiff cannot base her opposition to summary judgment entirely on the hope that a fact finder will disbelieve the persons who have submitted affidavits on issues of access."); *cf. Matsushita*, 475 U.S. at 586 ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.") (footnote omitted). (App.11a – 12a).[5]

As set forth in Supreme Court Rule 10, a petition which merely claims the misapplication of properly stated rules of law is not appropriate for review. Each of the rules set forth is properly stated, and this Court's inquiry need proceed no further in order to deny the Petition.

II. THE SIXTH CIRCUIT DID NOT MISAPPLY ANY OF THESE RULES OF LAW

Petitioners apparently argue that the Sixth Circuit misapplied these principles (1) by allowing summary judgment to be granted for Respondents after they failed to produce a computer file containing the prior independent creation, (2) by allowing summary judgment to be granted for Respondents where there were alleged factual inaccuracies in the record and (3) by allegedly shifting the burden of Respondents having to prove prior independent

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[5] Although the Sixth Circuit recites and relies upon other rules of law, those other rules are not germane to the issues raised by Petitioners.

creation to Petitioners having to disprove prior independent creation. Each of these arguments is without merit.

A. Respondents Did Not Fail To Produce The Demo Which Embodied The Prior Independent Creation; The Sixth Circuit Specifically Addressed This Issue And Found For Respondents.

Petitioners' argument is threefold:

1. Respondents failed or refused to produce a demo containing the performance of TWINE which was completed before February 4, 1999;

2. Petitioners argue that, based on this alleged failure of production, Petitioners were entitled to an adverse inference against Respondents, and

3. The failure of the District Court and the Sixth Circuit to draw an adverse inference acted to shift to Petitioners the burden of producing a piece of evidence that they could not produce: the Demo.

The result, Petitioners suggest, is a "re-writing" of the law of independent creation.

Although Petitioners never actually explain how the burden of proof has been shifted, the argument is without any basis in the Sixth Circuit's decision. The Sixth Circuit squarely rejected the lynchpin of Petitioners' argument – that Respondents never produced the Demo:

> Plaintiffs also point to the fact that Arnold never produced the demo recording that he made on January 6, 1999. Arnold testified that his computer

> at Air Studios showed that he last modified the recording on January 6, 1999, but offered no explanation as to why he could not produce a recording. According to Fogerty and Crow, "a party having control of information bearing upon a disputed issue may be given the burden of bringing it forward and suffering an adverse inference from [the] failure to do so." Appellant Br. At 21. Here, however, MGM is the party, not David Arnold, and it did produce an original copy of the demo recording from Don Black. Plaintiffs do not refute the authenticity of Black's copy of the song, and at all events never explain why they did not seek discovery of Arnold's computer to determine if the January 6th demo could still be retrieved.

(App. 16a – 17a).

Accordingly, the Sixth Circuit properly affirmed the decision of the District Court to grant summary judgment for the Respondents. Petitioners' Petition for Writ of Certiorari is without merit.

B. No Genuine Issue Of Material Fact Exists As To Petitioners' Claim Of Copyright Infringement Because Respondents Undisputedly Proved That The Independent Creation of TWINE Occurred Prior To February 4, 1999.

Next, Petitioners argue that Respondents failed to meet their burden to prove that TWINE was independently created prior to the earliest date that Respondents first had access to GAME. On the contrary, the record clearly shows that Respondents provided numerous declarations and depositions and abundant documentary evidence proving that Arnold and Black created TWINE

prior to February 4, 1999. The record also shows that Petitioners failed to provide *any* direct evidence to rebut the evidence submitted by the Respondents in support of their motion; instead they relied and continue to rely on a series of arguments based on meaningless factual inconsistencies and conjecture in an effort to show that they should be able to present their claim to a jury.

In copyright cases, however, a plaintiff cannot base his or her opposition to summary judgment "entirely on the hope that a fact-finder will disbelieve the persons who have submitted affidavits" on the issue of access. *Eaton v. Nat'l Broad. Co.*, 972 F. Supp. 1019, 1024 (E.D.Va 1997); *Vantage Point, Inc. v. Parker Bros., Inc.*, 529 F. Supp. 1204, 1213 (E.D.N.Y. 1981). Rather, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Barnhart v. Pickrel, Schaeffer & Ebling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

A plaintiff in a copyright infringement case must prove two elements: ownership of a valid copyright and copying of those constituent elements of the work that are original. *Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1095 (6th Cir. 1995) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Servs., Inc.*, 499 U.S. 340, 361, 111 S. Ct. 1282, 1296, 113 L. Ed. 2d 358 (1991)). The fact that Petitioners own a valid copyright in GAME is undisputed. (App. 9a). However, because Petitioners lacked direct evidence of copying by Respondents, they have asserted (1) that Respondents had access to GAME prior to creation of TWINE and (2) substantial similarity between the two works. *See Robert B. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 276-77 (6th Cir. 1988) (holding that in the absence of direct evidence of duplication, "the copyright holder frequently proves copying by showing

that the defendant or the person who composed the defendant's work had access to the copyrighted material and that the defendant's work is substantially similar to the protected work").

In order to rebut Petitioners' allegation of copying for purposes of their motion for summary judgment, Respondents produced evidence showing that TWINE was composed by Arnold prior to February 4, 1999, the date that they received a copy of GAME from the Petitioners. *See Ellis v. Diffie*, 177 F.3d 503, 507 (6th Cir. 1999) (holding that independent creation of an allegedly infringing work is an absolute defense to a claim of copyright infringement); *Grubb v. KMS Patriots, L.P.*, 88 F.3d 1, 3 (1st Cir. 1996) (granting summary judgment when evidence of prior independent creation rendered any conclusion of access or inference of copying "illogical"). Among other evidence, Respondents produced non-party affidavits, deposition testimony, personal calendar entries, hotel receipts, telephone records and promotional schedules showing (i) that Arnold and Black collaborated on TWINE in November and December 1998; (ii) that Arnold performed the song for his personal assistant and several others between October and December of 1998; (iii) that, in January 1999, Arnold recorded the Demo and sent it to the producers of the Film, the director of the Film and Shirley Manson; and (iv) that Arnold's U.S. agent sent a copy of the Demo to Respondents on February 3, 1999. (App. 10a). In addition, Respondents produced an original copy of the Demo and testimony from numerous non-party witnesses who heard the Demo prior to February 4, 1999, each of whom agreed that the song they heard prior to February 4, 1999, did not change materially after that. (App. 11a, 17a). None of this evidence was disputed by Petitioners.

As the Sixth Circuit noted, the location of Arnold's copy of the Demo is immaterial. The record contains Black's original copy of the Demo, and Petitioners have not presented any evidence refuting the testimony of Arnold, Black, Manson, Hillis, Wilson and Broccoli, each of whom confirmed that the melody contained on Black's copy of the Demo is the melody they heard in December 1998 and January 1999. Having failed to offer any evidence refuting the authenticity of the copy of the Demo in the record, Petitioner can make no logical argument why Arnold's failure to produce an additional copy of the Demo justifies the District Court's denying summary judgment for Respondents, the Sixth Circuit's reversal of the District Court or this Court's granting of the Petition.

C. In Response To The Evidence Presented By Respondents, Petitioners Offered No Evidence From Which A Rational Fact-Finder Could Reasonably Infer That TWINE Was Created After February 4, 1999.

This Court has held that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Nonetheless, Petitioners argue that under the holding in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), summary judgment is precluded in this case because a number of "inconsistencies" exist in the evidence that, as a matter of law, create triable issues of fact. (Petition at 16).

Supreme Court Rule 15 requires that a "brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Although Respondents respectfully submit that this Petition presents no arguments that are appropriate grounds for granting the Petition, the following addresses the perceived misstatements of facts or law contained therein.

Petitioners' argument is merely an attempt to reargue the application of a correctly stated principle of law to undisputed facts. It is also misguided. While *Matsushita* does place the burden on the moving party in a motion for summary judgment to demonstrate the absence of a triable issue of fact, *Matsushita*, 475 U.S. at 587, the nonmoving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Barnhart*, 12 F.3d at 1389. Moreover, while *Matsushita* requires a court to make all inferences in a light most favorable to the nonmoving party, those inferences must be reasonable. *Matsushita*, 475 U.S. at 587-88. Petitioners, however, would have this Court review a decision affirming summary judgment based on nothing more than conjecture, speculation and meaningless factual inconsistencies in the testimony provided by Respondents.

For example, Petitioners argue that letters written by Arnold's personal assistant, Trish Hillis, raise the inference that Arnold did not complete TWINE until after February 4, 1999. (Petition at 13-14). As the District Court and Sixth Circuit have previously explained, however, the Hillis letters refer to the entire musical score for the Film – not TWINE alone. (App. 14a, 45a). The only reasonable and logical inference to be made from this evidence – and

the one that both the District Court and Sixth Circuit made – is that the Film's musical score (as opposed to only TWINE) had not been completed prior to February 4, 1999.

Similarly, as the Sixth Circuit found, the fact that Arnold signed a contract with MGM in March of 1999 does not create a genuine issue of fact as to the date of creation of TWINE. The undisputed evidence shows that Arnold was selected to write the musical score for the Film by the producers and the director of the Film in September of 1998 (Broccoli Decl. at ¶ 4, JA 081; Wilson Decl. at ¶ 4, JA 088). Indeed, Petitioner Nathan Crow admitted in his deposition that Arnold had already been hired to write an original score for the Film as of February 4, 1999. (Deposition of Nathan Crow at 126, JA 298). Petitioners are correct in arguing that the Sixth Circuit was required to make reasonable inferences from ambiguous evidence in a light most favorable to the Petitioners; nonetheless, the Sixth Circuit held correctly that the dates of contract are of little probative value in light of all of Respondents' evidence.

Finally, the inconsistencies that Petitioners point to in the testimony of Manson and Black are meaningless. Petitioners do not dispute that Manson began recording the commercial version of TWINE in June 1999. (App. 15a). Nonetheless, in an effort to seek review of the Sixth Circuit's affirmance of summary judgment, Petitioners point to statements solicited by them in phone calls made under false pretenses to Manson and Black to the effect that Manson and Black received the Demo in August of 1999 and October of 1999, respectively – *after Manson had commenced recording of TWINE*. As the Sixth Circuit correctly held, no rational fact-finder could rely on these statements in finding for Petitioners. (App. 14a, 15a).

Moreover, the existence of these inconsistencies is not, as a matter of law, sufficient in itself to discredit the testimony of Manson and Black. *Grubb*, 88 F.3d at 4 ("[a]bsent specific facts discrediting testimony from a witness associated with the movant, and absent a direct conflict in the testimony, the opponent ... is not entitled to have the defendant's evidence positively disbelieved"); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1480 (6th Cir. 1989) ("[t]he trial court has at least some discretion [at summary judgment] to determine whether [plaintiffs'] claim is 'implausible'").

III. THE SIXTH CIRCUIT DID NOT SHIFT THE BURDEN OF PROVING INDEPENDENT CREATION OR OTHERWISE CREATE NEW LAW

Notwithstanding the factual shortcomings of Petitioners' argument, Petitioners rely on *Coles v. Wonder*, 283 F.3d 798 (6th Cir. 2002), for the proposition that summary judgment is not appropriate unless the moving party can produce the original version of a recording. The case is inapposite, and the Sixth Circuit, once again, specifically addressed this issue and found in favor of Respondents.

In *Coles*, a plaintiff owning a valid copyright registered in 1990 sought to establish that the song was the same as a song released by Stevie Wonder. Plaintiff's deposit copy was recorded in 1990. Wonder produced copies of the same song that he recorded in the early 1980s. Plaintiff claimed that the recording filed with the copyright registration form in 1990 was identical to a version of the same song that he completed in 1984. Plaintiff, however, could not produce a copy of the 1984 recording. The deposit copy was simply a recreation of the 1984 recording. Plaintiff did not listen to a recording from

1984 in making the deposit copy, and plaintiff did not refer to notes or other material written in 1984 in producing the deposit copy. Plaintiff simply recreated the deposit copy from memory.

The court held that recreations of earlier works are not sufficient to establish that the copy deposited in 1990 was identical to the version recorded in 1984. 283 F. 3d at 802. In this case, Respondents are not using the copy of the Demo provided by Black to prove similarity to a song recorded six years earlier. In this case, both the District Court and the Sixth Circuit concluded that both Black's and Arnold's version of the creation of TWINE place creation of the song prior to February 4, 1999. (App.12a-13a). Therefore, no one could rationally come to the conclusion that TWINE was completed after February 4, 1999. (*Id.*).

The *Coles* court also noted that the plaintiff could have met the deposit requirement by testifying that he made the 1990 recording after listening to an earlier copy or reviewing some other written materials from the earlier date. (*Id.*) In this case, all the testimony presented established that TWINE sounded identical in all material respects both before and after February 4, 1999, "especially in light of plaintiffs' inability to refute the delivery of the song to Manson at the Royal Garden Hotel on January 20, 1999." (App. 12a-13a).

Thus, contrary to Petitioners' argument, *Coles* does not support their argument that the Sixth Circuit has shifted the burden of proof in cases in which prior independent creation is raised as a defense. This Court should deny the Petition.

CONCLUSION

Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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